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No. 76-1071

In the Supreme Court of the United States

OCTOBER TERM, 1976

HUMBERTO MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A-1 to A-3).

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1976. A petition for rehearing was denied on January 5, 1977. The petition for a writ of certiorari was filed on February 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial because the government failed to produce an informant whom it had unsuccessfully sought to locate over an extended period of time prior to trial.

STATEMENT

Following a bench trial in the United States District Court for the District of New Jersey, petitioner was convicted of possession of heroin with intent to distribute (Count I) and sale of heroin (Count II), in violation of 21 U.S.C. 841(a)(1). He was sentenced to 15 years' imprisonment. The court of appeals affirmed without opinion (Pet. A-1 to A-3).

1. On January 15, 1975, Victor Alers, an informant for the Drug Enforcement Administration (DEA), telephoned petitioner and arranged a sale of narcotics from petitioner to Alers' "man" (undercover DEA agent Richard Sanchez) to take place the following afternoon at an agreed upon location. With Alers' consent, this call was recorded by the DEA (Tr. 41).[1]

The following afternoon agent Sanchez, accompanied by several other law enforcement officers, met petitioner and Alers in the parking lot of a Holiday Inn. Petitioner and Alers arrived in a car driven by Alers. After Alers parked the car, Sanchez entered the back seat; petitioner and Alers remained seated in the front (Tr. 211-212). Petitioner, who was introduced to Sanchez by Alers as "my man," asked Sanchez if he had the money. Sanchez replied that his friend in the other car was holding the money and asked whether petitioner had "the package." Petitioner said that he did and handed Sanchez a brown paper bag; the latter looked inside and saw eight small plastic bags containing a brown

[1]"Tr." refers to the transcript of the proceedings held on February 18-19, 1976. In those proceedings the district court first heard evidence relevant to petitioner's motions to suppress evidence and to dismiss the indictment and, after denying those motions (Tr. 190), proceeded to the trial on the merits.

granular substance, which was later determined to be heroin.[2] Petitioner was then arrested (Tr. 196-197; 212-213).

2. Prior to trial, petitioner moved for discovery of the name, address and criminal record of the government informant who had arranged the heroin sale. On May 24, 1975, the district court denied the motion. On July 21, 1975, petitioner renewed his motion and on September 29, 1975, the government disclosed Alers' name and last known address. Thereafter, on February 6, 1976, the government provided petitioner with Alers' date of birth and prior criminal record.

On February 18 and 19, 1976, the district court heard evidence on petitioner's motions to suppress the recorded conversation between petitioner and Alers and to dismiss the indictment because the government had failed to produce Alers for trial.[3] The evidence at the hearing showed that following petitioner's arrest on January 16, 1975, Alers was transported to the United States Attorney's Office in Newark, New Jersey, where Sanchez, who intended to use Alers in further investigations (Tr. 35), told him to telephone the DEA the next day.[4] Alers agreed to do so and departed (Tr. 26-27). When Alers failed to call, Sanchez telephoned his residence and spoke to his common law wife,

[2]Sanchez did not see Alers touch the bag at any time before petitioner handed it to Sanchez (Tr. 276).

[3]As stated in n. 1, *supra*, after denying those motions (Tr. 190), the court proceeded directly to the trial on the merits.

[4]Alers had become an informant for the DEA in September 1974. At that time, Sanchez visited him at the county jail in Trenton, New Jersey, where he was incarcerated following his arrest on drug charges. Sanchez proposed that Alers act as an informant for the DEA by infiltrating a narcotics operation with which Alers had had contact. In return for his cooperation, Sanchez told Alers that he would inform the state probation department of Alers' work for the DEA (Tr. 8-10).

who told him that she had not seen Alers since before January 15. Sanchez told her that, if Alers contacted her, she should either tell Alers to get in touch with DEA or call Sanchez herself (Tr. 27). Between January 16 and January 22, 1975, Sanchez again made repeated efforts to contact Alers at his residence and place of employment, but he was unsuccessful (Tr. 28-19).

On February 19, 1975, Alers telephoned Sanchez and told him he was in Puerto Rico on vacation and that he was staying at a certain address in Aquadilla (Tr. 29). He promised to contact Sanchez when he returned to New York in eight or ten days (Tr. 31). When Alers failed to telephone Sanchez in New York, as he had promised, Sanchez contacted a friend who was a postal inspector in the Bronx to check on the Aquadilla address that Alers had given him. Sanchez was subsequently informed that the address was either incomplete or fictitious and that no one fitting Alers' description had been seen in the Aquadilla area (Tr. 31-32).[5]

In April 1975, Sanchez was contacted by an officer of the New York Police Department who told him that Alers was wanted by the authorities in New York City for allegedly selling heroin in November 1974 (Tr. 43-44). Sanchez asked whether the New York police had attempted to locate Alers and was told that in January 1975 the police had gone to Alers' residence and business and had spoken to people in the surrounding area but had not been able to locate him (Tr. 90-91; 96-98). Sanchez thereafter made periodic contacts with the New York City Police to determine if they had discovered any leads to Alers' whereabouts (Tr. 42-43, 46).

[5]Since Alers was 5' 9" and weighted approximately 300 pounds, a person fitting his description would not likely have gone unnoticed (Tr. 7).

In November 1975, petitioner retained a private investigator to find Alers (Tr. 110-111). The investigator visited Alers' Brooklyn residence and spoke to the superintendent of the building and several tenants (Tr. 112-114). He also visited a nearby cleaning store and food market, spoke to people on the street, and visited the local welfare office and the post office, but he was unable to locate Alers; in fact, he determined that no one had seen Alers for months (Tr. 117-118).

In early 1976, Sanchez contacted (1) Dunn and Bradstreet, (2) the Con Edison Electric Company, (3) the New York Telephone Company, (4) the Special Investigations Section of the New York City Social Service Agency, (5) the San Juan office of the DEA, (6) the United States Postal Inspection Service, and (7) the Sheriff's Office of Mercer County, New Jersey, which had lodged a nationwide arrest warrant against Alers (Tr. 33-35; 109). None of these inquires produced any information concerning Alers' whereabouts. In January 1976, the private investigator hired by petitioner renewed his efforts to locate Alers but was also unsuccessful (Tr. 122-125).[6]

On these facts, the district court found that, although the efforts of Sanchez to locate Alers might have been more thorough, they were, under the circumstances, "reasonable" (Tr. 186); accordingly, the court denied the motion to dismiss the indictment (Tr. 190).

ARGUMENT

The only issue in this case is essentially a factual one—whether under the particular circumstances the government undertook reasonable efforts to locate an informant

[6]Indeed, defense efforts in this regard failed despite the fact that petitioner and Alers were friends and business partners in the Victor Moving Company (Tr. 24; 309).

and make him available as a witness for the defense.[7] The authorities cited by petitioner (Pet. 17-20) require no more than that the government make reasonable efforts to locate and produce an informant, and petitioner does not contend otherwise. The evidence adduced at the suppression hearing and trial, outlined above, amply support the district court's finding that the government's efforts to locate Alers were reasonable. Further review of that finding is not warranted.[8]

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[7]The obligation of the government to reveal the identity of an informant before trial is not at issue here (see *Roviaro* v. *United States*, 353 U.S. 53), since the government did disclose the identity of the informant, his last known address, and his criminal record. Nor is any arguable obligation of the government to reveal the names of anticipated government witnesses (see *Weatherford* v. *Bursey*, No. 75-1510, decided Februrary 22, 1977) at issue, since Alers was not a witness or an anticipated witness.

[8]In any event, Alers' absence did not deprive petitioner of any meaningful evidence. Although petitioner claimed that he was entrapped by Alers (Tr. 301-304), the evidence of his predisposition to sell heroin was overwhelming. Petitioner's January 15, 1975, conversation with Alers showed that he was actively engaged in selling heroin to others and that Alers had to persuade petitioner to hold on to the heroin for Sanchez rather than to sell it to someone else. The district court properly rejected the entrapment defense. It also found that the heroin originated with petitioner and had not been supplied to petitioner by Alers (Tr. 352-353).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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